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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE:

HARBANS S. GREWAL & MANJIT K.
GREWAL

DEBTORS.

HARBANS S. GREWAL & MANJIT K.
GREWAL

PLAINTIFFS,

v.

SANTA CRUZ COUNTY BANK & DOES 1-10

DEFENDANTS.

Case No. 10-60800

Chapter 7

Adversary No. 11-05067

**REPLY MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT**

HONORABLE ARTHUR S. WEISSBRODT

DATE: SEPTEMBER 23, 2011

TIME: 3:00 P.M.

PLACE: COURTROOM 3020

**280 SOUTH FIRST STREET
SAN JOSE, CA 95113-3099**

I. INTRODUCTION

In support of their Motion for Summary Judgment, the plaintiffs offered substantial evidence regarding ownership of the items at issue in this proceeding, including receipts. In response, the defendant offers no evidence regarding title to the property and conjectures that the plaintiffs' corporation may have owned some of the items. The corporate tax schedules submitted by the defendant in opposition to this motion, however, do not list the items at issue in this matter and therefore confirm the plaintiffs' ownership.

The defendant concedes that it changed the locks on the premises depriving

1 plaintiffs possession of their property. Thus, summary judgment is appropriate on the
2 conversion claim. Moreover, the defendant concedes actual knowledge of the bankruptcy
3 and refusal to return the property despite post-petition demand. Thus, the defendant
4 willfully violated the automatic stay, and judgment as to liability on this issue is
5 appropriate.

6 **II. ARGUMENT**

7 **A. THE PLAINTIFFS HAVE STANDING.**

8 Initially, the defendant states, “claims for violation of the automatic stay are
9 governed by Section 362 of the Code and turnover actions are controlled by Section 542,”
10 and then concludes, “The courts have repeatedly held that right to bring a turnover action
11 resides with the trustee or a debtor in possession” (pp. 1-2). This matter does not include a
12 turnover claim. The complaint asserts violations of the automatic stay and a state law
13 claim for conversion. Thus, the defendant’s substantial analysis of § 542 is completely
14 irrelevant.

15 The defendant then cites non-controlling authority and concludes that the Trustee is
16 the only party with standing to assert a violation of § 362. The argument is plainly false. *In*
17 *re Dawson*, 390 F. 3d 1139, 1146 (9th Cir. 2004) holds.

18 Congress chose the term “individual” to describe those who are eligible to
19 claim actual damages under § 362(h). The statute allows any “individual,”
20 including a creditor, to recover damages. So, for example, if a willful violation
21 of the automatic stay damages some portion of the bankruptcy estate, both
the debtor and an individual creditor of the now less-valuable estate may
recover actual damages. See *Johnston Envtl. Corp. v. Knight (In re Goodman)*,
991 F.2d 613, 618 (9th Cir.1993)

22 In fact, the Trustee does not have standing to assert a claim under § 362(h). If there
23 were any doubt *In re Pinkstaff*, 974 F. 2d 113, 115 (9th Cir. 1992) plainly holds, “A
24 debtor injured by a creditor's willful violation of a stay is entitled to recover his actual
25 damages, including costs and attorney's fees, resulting from that violation.”

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1 **B. THE DEFENDANT WAS REQUIRED TO RETURN THE PROPERTY ON THE**
2 **PETITION DATE.**

3 The defendant continues its irrelevant analysis of § 542 and concludes.

4 Even if Plaintiff has standing to assert a turnover claim under Section 542,
5 Defendant has no duty to turnover such assets and Defendants failure to
6 surrender same cannot constitute a stay violation, unless and until Plaintiff
7 demonstrates the following: (1) The property sought is in the possession,
8 custody or control of a third party; (2) the property constitutes property of the
9 estate; (3) the property is of a type that the trustee could use, sell or lease
10 pursuant to Section 363 or that the debtor could exempt under section 522;
11 and (4) the property is not of inconsequential value or benefit to the estate (p.
12 4).

13 The moving papers, however, correctly state that § 362 provides for damages upon
14 a finding that the defendant knew of the automatic stay and that the defendant's
15 actions that violated the stay were intentional. Whether the party believes in good faith
16 that it had a right to the property is not relevant to whether the act was "willful" or
17 whether compensation must be awarded. *Pinkstaff v. United States (In re Pinkstaff)*,
18 974 F.2d 113, 115 (9th Cir.1992).

19 Further, the defendant simply ignores the holding of *State of California v.*
20 *Employment Development Department v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147,
21 1151-52 (9th Cir. 1996) that is cited in the moving papers.

22 We now adopt the reasoning of *Abrams* and *Chugach*, and hold that the
23 knowing retention of estate property violates the automatic stay of §
24 362(a)(3).

25 11 U.S.C. § 542(a) provides that an entity in possession of estate property
26 "shall" deliver such property to the trustee. This is a mandatory duty
27 arising upon the filing of the bankruptcy petition.

28 Given these considerations, the defendant's entire argument is irrelevant, and its
admitted post-petition retention of the property violated the automatic stay.

29 **C. THE DEFENDANT ACTED WILLFULLY**

30 In response to the motion, the defendant claims that it never saw a bill of sale
31 until the Motion for Summary Judgment was filed (Chandler Dec. ¶ 8). The argument is
32 irrelevant, so the defendant has not created a disputed issue of fact.

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1 The defendant concedes receipt of the correspondence dated October 4, 2010
2 stating.

3 Dear Ms. Crawford:

4 I write to confirm the following facts regarding the unlawful actions of you and
5 your employer.

- 6 1. After completing foreclosure of the property, you personally instructed a
locksmith to change the locks on the premises;
- 7 2. You changed the locks prior to recording a deed;
- 8 3. You did not serve a three-day notice to vacate the premises as required by Cal.
Code Civ. Pro. § 1161a;
- 9 4. You did not file an unlawful detainer proceeding and instead used self-help to
gain access to the premises;
- 10 5. When you forcibly entered the premises; you found personal property
demonstrating that the premises were occupied;
- 11 6. I called you last Friday and specifically advised that you and your client
violated the law by changing the locks;
- 12 7. You called me back today, and I specifically asked whether your employer filed
an unlawful detainer to obtain possession of the premises;
- 13 8. You refused to answer; and
- 14 9. When I pressed the issue, you hung up on me. (Charles Dec., ¶3, Ex. 1).

15 The correspondence lists the plaintiffs' property at issue in this litigation.

16 The defendant does not dispute receiving the other communications regarding the
17 property submitted in support of the motion including correspondence specifically
stating that the defendant violated the stay. Further, the defendant does not dispute
21 and therefore concedes the following facts.

- 22 1. The defendant had actual acknowledgement of the bankruptcy filed on October
18, 2010.
- 23 2. The defendant is scheduled as an unsecured creditor being owed
\$847,471.00.
- 24 3. On Schedule B, Line 29, the plaintiffs listed the following personal
property, "Automotive equipment including wheel balancer and smog
machine."

- 1 4. In the underlying bankruptcy, the defendant did not claim secured status.
2 The Plaintiffs claimed exemptions pursuant to Cal. Code Civ. Pro. §§
3 703.140(b)(6) and 703.140(b).

4 Finally, as demonstrated in support of the motion for a preliminary injunction,
5 the defendant locked the plaintiffs out of the premises where they kept their business
6 records. After much effort, they were able to locate a copy of the receipt for the sale of
7 the business. Thus, the defendant cannot complain when it committed a forcible
8 detainer.

9 D. **THE PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE CONVERSION
10 CLAIM.**

11 In support of the motion, the plaintiffs offer overwhelming evidence that they
12 own the property at issue. In response, the defendant states, “Other than the mere use
13 of the word ‘conversion’ in the motion, Plaintiff has not supplied any evidence of
14 conversion.” While the plaintiffs’ schedules describe the items at issue and they
15 produced the actual receipts for the smog machine, dynamometer, and business, the
16 defendant simply argues that the items were not included in the financial statement
17 submitted to the bank. The financial statement, however, is substantially incomplete.

18 For example, the liabilities section is completely blank. While the items that are
19 the subject of the complaint are not listed, neither are any other items of personal
20 property. Consequently, the defendant certainly neither requested nor required a
21 comprehensive statement of assets and liabilities. More importantly, the defendant has
22 not offered any evidence disputing Mr. Grewal’s declaration regarding ownership of the
23 items converted by the defendant.

24 The defendant then mistakenly argues that this matter is a “quiet title” action
25 because it still possesses the items. As noted in the moving papers, however, “any act of
26 dominion wrongfully exerted over the personal property of another inconsistent with
27 the owner’s rights thereto constitutes conversion.” *Plummer v. Day/Eisenberg, LLP*
28 (2010) 184 Cal.App.4th 38, 50. Since the defendant admits that it possesses the
29 plaintiffs’ property, it is guilty of conversion.

1 **E. THE DEFENDANT IS NOT ENTITLED TO RULE 56(D) DISCOVERY.**

2 “Under Rule 56(f) [now 56(d)], an opposing party must make clear what
3 information is sought and how it would preclude summary judgment. *Brae Transp., Inc.*
4 *v. Coopers & Lybrand*, 790 F. 2d 1439 (9th Cir. 1984). Initially, the defendant claims
5 that it needs to take discovery including “personal property tax reports and work
6 papers, which would reflect personal property owned by All American and Plaintiff.”
7 With respect to American Gas and Auto, Inc. (“American”), their counsel submitted
8 documentation from the Secretary of State demonstrating that company is dissolved
9 (Lewis Dec., Ex. C). Thus, discovery with respect to this entity is not available.

10 As to the plaintiffs, evidence submitted by the defendant demonstrates that Rule
11 56(d) discovery will accomplish nothing. On March 27, 2,000, Mr. Grewal purchased a
12 service station located at 8385 Monterey Road in Gilroy (“Premises”). The bill of sale
13 includes all assets of the business (Grewal Dec., ¶3 & Ex. 1). The “major assets” are
14 described in a two paged, hand written addendum. Many of the items at issue are listed
15 in the addendum. The Plaintiffs operated a proprietorship known as Grewal Shell on
16 the Premises. On May 21, 2003, the Plaintiffs bought equipment to test vehicle
17 emission systems for \$26,500.00 through a financed lease (“Lease”) (Grewal Dec., ¶5,
18 Ex. 2). The items included a CA Bar 97 Revised Smog System, cooling fan, and a
19 dynamometer (Grewal Dec., ¶6).

20 Later, the Plaintiffs incorporated American and operated an automobile repair
21 business on the Premises. The Plaintiffs did not contribute their personal property to
22 the business (Grewal Dec., ¶9). Thus, the defendant must demonstrate that the
23 plaintiffs contributed their assets to the business. In this context, the Chandler
24 Declaration states.

25 14.Attached hereto as Exhibit E are true and complete copies of the 2004,
26 2006 and 2007 depreciation schedules provided by All American to
27 Defendant. Such depreciation schedules show a number of items of
Property.

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1 The American depreciation schedules, however, support the motion. The
2 following items are listed in Exhibit E.

- 3 1. BLDG. -8385 MONTEREY
4 2. FUR. & FIX .
5 2. TIRE CHANGE MACHINE
6 3. TIRE CHANGER
7 4. SCANNER
8 5. COMPUTER
9 6. UST (Underground Storage Tank) SYSSYSTEM
10 7. BLDG. IMP.
11 8. PUMP INSTLL. LABOR
12 9. COMPTR. & ACCSR.
13 10. COMPTR. & ACCSR.

14 The moving papers identify twenty-four items or groups of items that the
15 plaintiffs own, and a chart is included in the Memorandum of Points and Authorities in
16 support of the motion. Except for Item 16 “Desktop computer in the shop” (Grewal Dec.,
17 ¶18) that could be “COMPTR. & ACCSR,” none of the items in the schedules bear any
18 resemblance to the property claimed in this motion. Thus, the American tax schedules
19 submitted by the defendant actually support the motion. To the extent that a disputed
20 issue of fact exists regarding ownership of the “Desktop computer in the shop,” the
21 motion is withdrawn as to that item.

22 In response to a Motion for Summary Judgment, the defendant cannot rely the
23 allegations of its pleadings but must demonstrate that material issues of fact must be
24 tried. Other than an incomplete financial statement, the defendant offers nothing
25 disputing title to the property or indicating the need for additional discovery. Since the
26 American tax schedules offered by the defendant refute any notion that the plaintiffs
27 contributed property to American, no further discovery on this issue is needed.

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1 **F. THE SETOFF CLAIM DOES NOT PRECLUDE SUMMARY JUDGMENT.**

2 Lastly, the defendant claims that the Court cannot award summary judgment on
3 plaintiffs' claims, until it resolves defendant's setoff claim. The argument is hardly
4 compelling. The plaintiffs have no reason to dispute the amount of the deficiency after
5 the foreclosure, but that fact is irrelevant.

6 The Bankruptcy Code provides for setoff, preserving certain rights that exist
7 under relevant non-bankruptcy law. 11 U.S.C. § 553; see also 5 Collier on Bankruptcy ¶
8 553.04, at 553-59 (15th ed. rev.1996). Under setoff, mutual debts cancel each other.
9 These debts may arise either from separate transactions or a single transaction but
10 must be incurred prior to the filing of a bankruptcy petition. See 5 Collier ¶ 553.10, at
11 553-100; see also 11 U.S.C. § 553(a).

12 While the instant motion only seeks a judgment as to liability, the damages
13 resulting from violation of § 362 occurred post-petition. Thus, setoff is not available, and
14 the plaintiffs are entitled to judgment finding that the defendant intentionally violated
15 the automatic stay.

16 The conversion claim is slightly different, but the result is the same. The
17 defendant converted the plaintiffs' property on September 29, 2010 when it changed the
18 locks on the Premises. While that act occurred almost three weeks before the
19 bankruptcy, the defendant still possesses the property. Since "the property consists of
20 machinery, automobiles or something else with a readily provable use or rental value,
21 the plaintiff[s] may recover the value of the use from the time of taking to the time he
22 regains possession." (6 Witkin, Summary of Cal. Law (9th ed.1988) § 1457, p. 931).

23 Here, the property was determined to be exempt or abandoned to the plaintiffs.
24 Therefore, summary judgment as to ownership and restoration of possession pursuant
25 to Cal. Code Civ. Pro. §667 are appropriate. While the defendant may be able to setoff
26 the deficiency against the three weeks in which the plaintiffs lost use of the property
27 before the bankruptcy, this motion does not seek liquidation of the damages sought.
28 Thus, setoff is not implicated. In any event the amount of post-petition damages is left

1 for another day.

2 **III. CONCLUSION**

3 Given these considerations, the motion should be granted.

4 Dated: September 16, 2011

5 CAMPEAU GOODSELL SMITH
6 A Law Corporation

7 By: /s/Gregory J. Charles
8 Gregory Charles
9 Attorneys for the Plaintiff